

The judgment in default ordered by the learned magistrate here is therefore set aside and the applicant given seven days from today to file his appearance and defence.

As regards costs, the applicant here must bear the costs. The applicant is ordered to pay \$300 to the respondent (plaintiff) being costs occasioned by him not being present on the day the judgment was entered and to pay the same within seven days from today.

Application allowed.

Solicitors: *Daim & Gamany.*

Reported by *Ng Sheau Jiuan*

Eu Finance Bhd v Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener)

HIGH COURT (JOHOR BAHRU) – ORIGINATING SUMMONS
NO 180 OF 1985
LC VOHRAH J
22 SEPTEMBER 1988

Land Law – Private caveat – Foreclosure proceedings against chargor's land – Auction sale of land – Land sold to intervener – Caveat lodged by registered owner against own land – Removal of caveat – Whether registered owner can maintain caveat – Whether intervener breached contract of sale – National Land Code 1965, s 323

Eu Finance Bhd ('Eu Finance') is a licensed finance company and became the registered chargee of the defendant's land ('the said land') as a result of a loan granted to Siland Sdn Bhd ('Siland'). Siland defaulted in its payments in respect of the loan and Eu Finance applied to the court for an order for sale which was granted. The said land was sold by way of a public auction on 25 January 1987 to the intervener ('M & J') for \$196,000. A sum of \$49,000, being 25% of the purchase price, was paid as deposit. The memorandum of contract stipulated that the balance of the purchase price in the sum of \$147,000 had to be paid within 30 days of the date of the sale, ie on or before 24 February 1987, whereupon M & J would have been entitled to a registrable certificate of sale to be issued by the senior assistant registrar. On 18 February 1987, the solicitors for M & J wrote to the senior assistant registrar of the High Court asking for an extension of time for a period of two months from 25 February 1987 to pay the balance. The senior assistant registrar received this letter on 21 February 1987 but gave no reply. On 9 April 1987, Siland lodged a private caveat in respect of the said land. On 9 May 1987, Eu Finance applied for the removal of the caveat and on 8 July 1987 the application was struck out. On 30 August 1987 Siland and the auctioneer brought a civil suit against M & J for, inter alia, rescission of the memorandum of contract and for forfeiture of the deposit paid by M & J. On 15 July 1987, M & J filed an application praying for an extension of time to complete the purchase and an order was granted extending the time for completion by a period of 14 days from that date. On 21 February 1988, the order granting the extension of time was set aside. M & J has since paid the

balance of the purchase price into court. M & J was willing and able to complete the purchase but is prevented from doing so by the existence of the caveat lodged by Siland. This is therefore an application by Eu Finance for the removal of the caveat. The only issue for determination is whether Siland has a caveatable interest under s 323 of the National Land Code to enter the caveat. Counsel for the defendant concedes, inter alia, that since M & J has not observed the condition of sale with regard to the payment of the balance of the purchase price, Siland remains the owner of the said land and argues that by virtue of that status alone it acquires the right to enter and maintain the caveat because of the words in the first limb of s 323(1)(a).

Held, allowing the application to remove the caveat:

(1) Siland could not successfully bring itself within the first limb of s 323 in the light of its plain meaning. A person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land, and must as a matter of logic be excluded by the language of s 323(1), for he is not 'claiming' title to the land: title is already his.

(2) As Siland has founded its right to caveat solely on its status as the registered owner of the said land, Siland merely as registered owner was not entitled to caveat its own interest. An order in terms of the application was granted in that the caveat lodged by Siland be removed forthwith by the Registrar of Titles.

Case referred to

1 *Re An Application by Haupiri Courts Limited (No 2)* [1969] NZLR 353 (fold)

Legislation referred to

National Land Code 1965 ss 256, 323(1)(a)
Land Transfer Act 1952 [NZ] s 137

Kenny Ng for the plaintiff/applicant.

S Gunasegaran for the defendant/respondent.

Arthur Lee (SC Yap with him) for the intervener.

Cur Adv Vult

LC Vohrah J: This is an application on the part of Eu Finance Bhd ('Eu Finance') for the removal of a caveat which has been lodged by Siland Sdn Bhd ('Siland') against a piece of land held under HS(D) 40269 Lot PTD 18279 in the Mukim of Plentong, Johor Bahru ('the said land') of which Siland is the registered owner.

The facts forming the background of this application are as follows. Eu Finance is a licensed finance company and became the registered chargee of the said land as a result of a loan granted to Siland. Siland defaulted in its payments in respect of the loan and Eu Finance accordingly on 14 April 1985 applied to the court by Originating Summons No 180 of 1985 under s 256 of the National Land Code for an order for sale which was granted on 18 November 1986. The said land was put up for public auction on 25 January 1987 with a reserve price of \$180,000. In the event the said land was sold to one Krishnan Moorthy who was acting for M & J Frozen Food Sdn Bhd ('M & J') for \$196,000 and a sum of \$49,000 being 25% of the purchase price was paid as

deposit. The memorandum of contract stipulated that the balance of the purchase price in the sum of \$147,000 had to be paid and the purchase completed according to the conditions of sale within 30 days of the date of the sale, ie by payment into court of the balance of the purchase price on or before 24 February 1987 whereupon M & J would have been entitled to a registrable certificate of sale to be issued by the senior assistant registrar. However, on 18 February 1987 before the expiry of the 30-day period the solicitors for M & J wrote to the senior assistant registrar of the High Court asking for an extension of time for a period of two months from 25 February 1987 to pay the balance as the processing of the bank loan applied for by M & J had not been finalized. The senior assistant registrar received this letter on 21 February 1987 but gave no reply. On 9 April 1987, Siland lodged a private caveat in respect of the said land. On 14 April 1987 the bank approved M & J's application for the loan but the loan could not be released because of the caveat. On 9 May 1987, Eu Finance applied by Originating Summons No 31-475-87 for the removal of the caveat. Siland opposed the application and on 8 July 1987 the application was struck out. On 30 August 1987, Siland together with the auctioneer appointed by the court, as first and second plaintiffs respectively, brought an action in Civil Suit No 22-980-87 against M & J for rescission of the memorandum of contract, for forfeiture of the deposit of \$49,000 paid by M & J to the credit of these proceedings and for a declaration that M & J was not entitled to enlargement of time to complete the purchase. On 15 July 1987, M & J, on a certificate of urgency, filed an application by way of Originating Summons No 31-731-87 citing Eu Finance as respondent praying for extension of time to complete the purchase and an order was granted the same day extending the time for completion by a period of 14 days from that date. On 21 February 1988, the court allowed Siland to intervene in the proceedings relating to Originating Summons 31-731-87 and set aside the order it had made granting the extension of time. M & J has since paid the balance of the purchase price into court. Siland as registered owner continues to collect rentals from the ground and second floors of the three-storey shophouse on the said land. M & J is willing and able to complete the purchase but is prevented from doing so by the existence of the caveat lodged by Siland. There has been no allegation whatsoever of any fraud or impropriety against Eu Finance or M & J with regard to the judicial sale.

The only issue for determination is whether Siland has a caveatable interest under s 323 of the National Land Code to enter the caveat. Counsel for the defendant Mr Gunasegaran concedes that the onus is upon him to satisfy the court that the defendant has a caveatable interest under s 323 of the National Land Code. The relevant provisions read:

A (1) The persons and bodies at whose instance a private caveat may be entered are:

- (a) any person or body *claiming* title to, or any registrable interest in, any alienated land or any right to such title or interest; (emphasis provided)

B Siland has founded its right to caveat solely on its status as the registered owner of the said land. Mr Gunasegaran says that since M & J has not observed the condition of sale with regard to the payment of the balance of the purchase price Siland remains the owner of the said land and argues that by virtue of that status alone it acquires the right to enter and maintain the caveat because of the words in the first limb of s 323(1)(a), that is to say 'any person or body claiming title to' even at this stage when the court has made an order for the sale of the said land. I do not agree. I do not think Siland can successfully bring itself within this first limb in the light of its plain meaning because in my view a person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land and must as a matter of logic have been excluded by the language of s 323(1). As has been very succinctly put by the learned author Judith E Sihombing in her *National Land Code* (1981 Ed) at p 594, 'one difficulty involved is that of deciding his standing under s 323 for he is not 'claiming' title to the land: title is already his.' Support for this view can be found in *Re An Application by Haupiri Courts Ltd* (No 2).¹ In that case, Haupiri Courts Ltd (in liquidation) as registered proprietor had lodged a caveat to prevent the registration of a transfer by the Registrar of the Supreme Court to the registered mortgagee Piako Construction Ltd of Haupiri's land which the mortgagee had bought at the registrar's sale. Haupiri alleged that the mortgagee's power of sale had not become exercisable by reason of failure to comply fully with the relevant provisions of the New Zealand Property Law Act. It was held that Haupiri could not protect itself by caveat against the registration of the alleged improper dealing in the light of the provisions of s 137 of the New Zealand Land Transfer Act 1952, the relevant provisions of which read:

H Any person –

- (a) claiming to be entitled to or to be beneficially interested in any land, estate, or interest under this Act by virtue of any unregistered agreement or other instrument or transmission or of any trust expressed or implied, or otherwise howsoever ... may at any time lodge with the registrar a caveat in Form N ...

I According to its headnote the case is authority for the proposition that a registered proprietor cannot lodge a caveat against dealings under the Land Transfer Act merely because he is the registered proprietor. Richmond J elaborated at p 357:

He must go further and establish some set of circumstances over and above his status as registered proprietor which

affirmatively gives rise to a distinct interest in the land. In such circumstances it would seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat ... In *Re Grand Trunk Pacific Development Co Ltd* (1912) 7 DLR 611, 613, Lamont J stressed the requirement that a caveator must derive the interest which he claims through the transaction (in that case an unregistered agreement) on which the caveat is founded and not from his existing status as registered proprietor. I respectfully agree with that view ... An unduly extensive right to caveat could well lead to an unwarranted interference with the interests of others endeavouring to obtain registration of dealings. Moreover, the registered proprietor, in a case such as the present, is not without his remedy, for he may apply to this court for an interim injunction against registration.

In the event, it is my judgment that Siland merely as registered owner was not entitled to caveat its own interest and I have therefore to make an order in terms of the application that the caveat lodged by Siland be removed forthwith by the Registrar of Titles.

Order accordingly.

Solicitors: *KC Yap Kamaludin & Partners; Guna & Co; Arthur Lee, Yap & Netto.*

Reported by *Wong Kim Fatt*

Government of Malaysia v Chia Kee Teck

HIGH COURT (MALACCA) – CIVIL SUIT NO 21-169 OF 1984
WAN YAHYA J
16 AUGUST 1988

Revenue Law – Claim for additional taxes extending over 13 years – Whether s 91(1) of Income Tax Act 1967 permissive in nature – Whether 12-year limitation period applied to proceedings for recovery of tax – Claims can go beyond 12-year period if fraud, wilful default or negligence is proved – Income Tax Act 1967, s 91 – Limitation Ordinance 1953, s 33

Civil Procedure – Limitation – Claim by Revenue for additional taxes extending over 13 years – Whether claim is statute-barred – Whether 12-year limitation period applies to proceedings for recovery of tax – Section 91(1) of Income Tax Act 1967 permissive in nature – Claims can go beyond 12-year period if fraud, wilful default or negligence is proved – Income Tax Act 1967, s 91 – Limitation Ordinance 1953, s 33

The only issue raised in the appellant/defendant's appeal is on the authority of the Director General of Income Tax to impose additional taxes on the appellant/defendant extending over the period of 13 years. The appellant/defendant contended that under s 91 of the Income Tax Act 1967 ('the Act') the Revenue's claim is statute-barred if extended over the period of 12 years.

A Held, dismissing the appeal:

(1) Section 91 of the Act has to be read with s 33 of the Limitation Ordinance 1953 which provides that limitation will not apply to any proceedings by the government for the recovery of tax.

B (2) The word 'may' in s 91 denotes a permissive, rather than a restrictive, authority to the Director General to impose taxes within 12 years and the period of 12 years was specified in order to bring it within the purview of the Limitation Ordinance 1953. Consequently, s 91(1) of the Act, concomitantly read with s 33 of the Limitation Ordinance, would enable the Revenue to recover taxes beyond the 12-year period. The period of 12 years in s 91(1) has been rendered irrelevant by the proviso to s 33 of the Limitation Ordinance.

C (3) Even if the 12-year period in s 91(1) is intended to be a limitation period, the Revenue action can still go beyond this period if it could be established that fraud or wilful default has been committed by or on behalf of any person or that person has been negligent.

Case referred to

D 1 *Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72 (fold)

Legislation referred to

Income Tax Act 1967 ss 2, 91
Limitation Ordinance 1953 s 33

E *Rashid Ali* for the appellant/defendant.
Abdul Karim bin Abdul Jalil for the respondent/plaintiff.

Cur Adv Vult

F **Wan Yahya J:** The singular issue raised in this appeal is on the authority of the Director General of Income Tax to impose additional taxes on the appellant extending over the period of 13 years. Counsel for the appellant reading s 91 of the Act contends that the provisions therein would in effect preclude enforcement by the tax department for any claim extending over the period of 12 years or in other words claims which are statute-barred.

Subsection (1) of s 91 on which counsel based his argument reads:

H (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

I (2) Where the Director General discovers that the whole or part of any tax repaid to a person (otherwise than in consequence of an agreement come to with respect to an assessment pursuant to s 101(2) or in consequence of an assessment having been determined on appeal) has been repaid by mistake whether of fact or law, the Director General may make an assessment in respect of that person in the amount of that tax or that part of that tax, as the case may be: